

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 48

Docket No. CH-0831-08-0579-I-1

**Dorothy Luten,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSF 3 103 660

March 31, 2009

Dr. Charles S. Brown, Dayton, Ohio, for the appellant.

Kristine Prentice, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of the September 26, 2008 initial decision (ID) that affirmed the Office of Personnel Management's (OPM) reconsideration decision which denied her request for survivor annuity benefits under the Civil Service Retirement System (CSRS) as the spouse of a deceased federal retiree. For the reasons set forth below, the Board GRANTS the appellant's petition, VACATES the ID, and REMANDS the case to the Central Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On May 21, 1987, the appellant's late husband, Perry E. Luten, signed a Standard Form (SF) 2801 retirement application. Initial Appeal File (IAF), Tab 9 at 3-4. Mr. Luten placed his initials in Box 1 of Section D of the SF 2801, thereby electing to provide maximum survivor benefits to the appellant. Box 2 of the SF 2801, which was not initialed by Mr. Luten, states that "I CHOOSE AN ANNUITY PAYABLE ONLY DURING MY LIFETIME. (If you are married and elect this, attach Standard Form 2801-2.)." *Id.* at 3. A portion of Box 2 appears to be highlighted and contains the following handwritten notation: "Amended 2801 to come – per MSC 6-5-87 . . . (Wants item 2.)." On the back of the SF 2801, Mr. Luten checked the box marked "No" in response to question 5 of the "Applicant's Checklist", which inquires, "[i]f you are married and you elected either less than full survivor benefits (Election 1b) or an annuity payable only to you . . . during your lifetime (Election 2), did you attach SF 2801-2, Spouse's Notification of Survivor Election?" *Id.* at 4. A stamp on the SF 2801 indicates that it was received by the Postal Data Center on May 26, 1987. *Id.* at 3.

¶3 On the same day that Mr. Luten completed the SF 2801, however, he and the appellant signed an OPM Form 1431, "Spouse's Consent to Survivor Election." *Id.* at 5. An "x" appears in Box 1.b. of Part 1 of the form, indicating her husband's election of "[a]n annuity payable only to me during my lifetime with no survivor annuity payable to my spouse after my death." *Id.* Above the appellant's signature in Part 2 is the statement, "I freely consent to the survivor annuity election described in part 1. I understand that my consent is final (not revocable)." Part 3 of the Form 1431 is signed by a notary public and contains the statement, "I certify that the person named in Part 2 presented identification (or was known to me), gave consent, signed or marked this form, and acknowledged that the consent was freely given in my presence." A stamp appears on the Form 1431, indicating that it was also received by the Postal Data Center on May 26, 1987. *Id.*

¶4 On May 29, 1987, Mr. Luten executed a second SF 2801, upon which his initials appear in Box 2, rather than Box 1 of Section D, thereby indicating that he elected not to provide a survivor benefit to the appellant. *Id.* at 7-8. Again, Mr. Luten checked the box marked “No” in response to question 5 of the “Applicant’s Checklist” on the back on the back of the SF 2801, indicating that he did not attach an SF 2801-2. *Id.* at 8. A stamp on the form indicates that it was received by the Postal Data Center on June 8, 1987. *Id.* at 7.

¶5 Upon the death of the Mr. Luten in 2007, the appellant applied for a monthly survivor annuity. IAF, Tab 4, Subtab 5. OPM denied the request, however, finding that her husband elected not to provide a survivor benefit to her and that she had consented to this election by waiving her right to the benefit. IAF, Tab 9 at 1-2.

¶6 This appeal followed. In her sworn testimony during a telephonic hearing, the appellant stated that she signed the Form 1431 on May 21, 1987, after her husband showed her the original Form 2801 in which he elected to provide her maximum survivor benefits. Hearing Tape 1, Side A. She further testified that when she signed the consent form at her home, there was no “x” placed in block 1.b of Part 1, that she would not have signed the form if there had been an “x” in block 1.b, and that there was no notary public present when she signed the form.¹

¹The appellant provided a notarized statement attesting to the same, asserting that

(1) The only Form #2801 that I received prior to your letter is the form originated on May 21, 1987, indicating my husband’s choice of maximum survivor benefits.

(2) At the time I signed this form, there was no (x) in Box 1b. I would not have signed if there had been an (x) in that box.

(3) Finally, I do not know and did not appear before the Notary Public who signed and affixed his seal to the form. Therefore, he could not properly certify that I signed and in his presence acknowledged that the consent implied by the check in Box 1b was freely given.

IAF, Tab 7.

Id. She also testified that she never saw the second SF 2801 and was unaware of its existence until after her husband's death. *Id.*

¶7 The AJ affirmed OPM's reconsideration decision, finding that the appellant provided no evidence, beyond her own assertion, that it was her husband's intention to provide her maximum survivor benefits, the documentation proved it was not her husband's intention to provide her with maximum survivor benefits, and the appellant did not produce any evidence that the agency or the notary public engaged in a fraudulent scheme to deny her the benefits of her deceased husband's annuity. IAF, Tab 11, ID at 3.

¶8 On review, the appellant reasserts her claim that the notary was not present when she signed the Form 1431 on May 21, 1987, and contends that her intent in signing the Form 1431 was to affirm her husband's election of a full survivor annuity, as indicated by his initials on the SF 2801 bearing the same date. Petition for Review File, Tab 1 at 11.

ANALYSIS

¶9 As the applicant for a survivor annuity, the appellant has the burden of proving that she is entitled to the benefits sought. *Cheeseman v. Office of Personnel Management*, [791 F.2d 138](#), 140-41 (Fed. Cir. 1986). The applicable statute in this case is [5 U.S.C. § 8341](#), which states, in relevant part,

[I]f an employee . . . dies after having retired under this subchapter and is survived by a widow . . . , [his] widow . . . is entitled to an annuity equal to 55 percent . . . of [the] annuity . . . unless the right to a survivor annuity was waived under . . . section 8339(j)(1).

[5 U.S.C. § 8341](#)(b)(1). Section 8339 of chapter 5, "Computation of annuity," also pertinently provides,

[A CSRS] annuity . . . for an employee . . . who is married at the time of retiring under this subchapter is reduced . . . to provide a survivor annuity for the spouse under section 8341(b) of this title, unless the employee . . . and the spouse jointly waive the spouse's right to a survivor annuity in a written election filed with [OPM] at the time that the employee . . . retires. Each such election shall be

made in accordance with such requirements as [OPM] shall, by regulation, prescribe, and shall be irrevocable.

[5 U.S.C. § 8339](#)(j)(1). OPM's implementing regulations state,

- (a) A married employee may not elect a self-only annuity . . . without the consent of the current spouse
- (b) Evidence of spousal consent . . . must be filed on a form prescribed by OPM.
- (c) The form will require that a notary public or other official authorized to administer oaths certify that the current spouse presented identification, gave consent, signed or marked the form, and acknowledged that the consent was given freely in the notary's or official's presence.
- (d) The form described in paragraph (c) of this section may be executed before a notary public²

[5 C.F.R. § 831.614](#). OPM's *CSRS and Federal Employees' Retirement System (FERS) Handbook for Personnel and Payroll Offices* provides further guidance:

A. Rule

If a retiree who is married at the time of retirement does not wish to provide the maximum current spouse survivor annuity, he or she must obtain the spouse's consent.

Spousal consent must be given on SF 2801-2, Spouse's Consent to Survivor Election. OPM regulations require that spousal consent be given by completing the OPM consent form before a notary public or other official authorized to take oaths.

B. Who May Properly Witness Spousal Consent

1. The proper officials to witness spousal consent are officials authorized to administer oaths for all purposes and to take acknowledgements, such as notaries.

NOTE: The function notaries perform in witnessing spousal consent is taking an acknowledgement. An acknowledgement is the act of a person who has executed a document by going before an official authorized to take the acknowledgement and declaring it to be his or her voluntary action.

² OPM's regulations in effect in 1987 also contained substantially similar language. See [5 C.F.R. § 831.607](#) (1987).

Ch. 52, § 52A2.1-2 (Apr. 1998) (emphasis added).³

¶10 Although the AJ correctly determined that the appellant bears the burden of proving that she is entitled to a survivor annuity, she affirmed OPM’s reconsideration decision because the appellant did not prove that it was her husband’s intention to provide her maximum survivor benefits and she did not produce any evidence that the agency or the notary public engaged in a fraudulent scheme to deny her the benefits of her deceased husband’s annuity. ID at 3-4. In doing so, the AJ both misconstrued the governing law and the appellant’s contentions on appeal. Irrespective of her husband’s intentions, the governing statutory language is clear that the appellant “is entitled to an annuity . . . *unless* the right to a survivor annuity was waived.” [5 U.S.C. § 8341](#)(b)(1) (emphasis added); *see also* [5 C.F.R. § 831.614](#). Thus, the relevant inquiry in determining whether the appellant met her burden of proving her entitlement to the benefit she seeks is whether she waived her right to a survivor annuity by consenting to her husband’s election of a self-only annuity. *Steele v. Office of Personnel Management*, [57 M.S.P.R. 458](#), 464-65 (1993), *aff’d*, 50 F.3d 21 (Fed. Cir. 1995) (Table). Moreover, although unilateral mistake is not a ground for voiding freely-made elections concerning survivor annuities and it is a “settled proposition that one is not relieved from the consequences of a written election absent a showing that mental incompetence, duress or fraud is the reason for an election one later seeks to void,” *Collins v. Office of Personnel Management*, [45 F.3d 1569](#), 1573 (Fed. Cir. 1995), the appellant is not seeking to void her election, but instead contends that she never made an effective election at all.

¶11 There is no dispute that the “evidence of [the appellant’s] consent” was filed on a Form 1431 rather than an SF 2801-2. IAF Tab 9 at 4. Although on its

³ Although the *Handbook* does not appear to be the product of a formal rulemaking or adjudication process, the Board has found that it is entitled to some deference. *See Moore v. Department of Veterans Affairs*, [109 M.S.P.R. 386](#), ¶ 9 (2008).

face, the Form 1431 meets the requirements specified at [5 C.F.R. § 831.614\(c\)](#), OPM's *Handbook* requires that spousal consent be given on an SF 2801-2. In any event, the appellant challenges the probative value of that evidence. The AJ was presented with an issue of the credibility of two declarants, the appellant who claimed that there was no "x" placed in block 1.b of Part 1 when she signed the Form 1431 and that she did not sign it in the presence of the notary, and the notary, who certified that the appellant did sign the form in his presence. The AJ, however, failed to resolve these credibility issues, consistent with the Board's decision in *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987) (to resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor).

¶12 Moreover, we note that although the appellant testified at the hearing, the notary did not. The notary's certification on the Form 1431 is hearsay evidence, and is properly admitted into evidence under well-settled law that relevant hearsay evidence is admissible in administrative hearings. *Borninkhof v. Department of Justice*, [5 M.S.P.R. 77](#), 83-87 (1981). Under *Borninkhof*, however, the AJ must first determine whether such evidence has significant probative value according to the circumstances of the case. *Scroggins v. U.S. Postal Service*, [48 M.S.P.R. 558](#), 565 (1991). If so, the AJ must then determine whether the value of that hearsay evidence is outweighed by the other evidence of record, including the appellant's oral testimony. *Stewart v. Office of Personnel Management*, [8 M.S.P.R. 289](#), 294 (1981). Following judicial precedents examining the weight

to be given hearsay evidence, the Board has identified the following factors, among others, to consider in assessing the probative value of hearsay evidence: the availability of persons with firsthand knowledge to testify at the hearing; whether the statement of the out-of-court declarant was signed or in affidavit form and whether anyone witnessed the signing; whether the declarant was a disinterested witness to the events; the consistency of the declarant's account with other information in the case; internal consistency; the absence of contradictory evidence; and the credibility of the declarant when he made the statement attributed to him. *See Spruill v. U.S. Postal Service*, [84 M.S.P.R. 36](#), 44-5 (1999) (citing *Borninkhof*, 5 M.S.P.R. at 83-87). To the extent that the AJ relied on the notary's certification on the Form 1431, she failed to assess its probative value.

¶13 Inasmuch as the proper disposition of this case depends upon the resolution of disputed factual matters, this appeal must be remanded so that the AJ, who conducted the hearing in which these matters were addressed, can make the initial findings and conclusions. *Marchese v. Department of the Navy*, [65 M.S.P.R. 104](#), 109 (1994). Moreover, since credibility is at issue, and since deciding issues of credibility is normally the province of the trier of fact, *Uske v. U.S. Postal Service*, [60 M.S.P.R. 544](#), 557 (1994), *aff'd*, [56 F.3d 1375](#) (Fed. Cir. 1995), remand to the AJ is the appropriate disposition. On remand, the parties should also be given the opportunity to present evidence and argument on the issue of whether a spousal consent form must contain a mark in the box indicating the applicant's election of a self-only annuity at the time it is signed by the spouse in order to constitute an effective waiver of the spouse's right to a survivor annuity.⁴

⁴ As discussed above, OPM's *CSRS and FERS Handbook* provides that "[s]pousal consent must be given on [an] SF 2801-2," and the instructions on the SF 2801 instruct applicants electing a self-only annuity to attach an SF 2801-2. Inasmuch as the current version of the SF 2801-2 states that "[p]revious editions are not usable," this appeal also presents the issue of whether evidence of spousal consent filed on a Form 1431, rather than an SF 2801-2, can constitute "[e]vidence of spousal consent . . . filed on a

ORDER

¶14 Accordingly, we remand this case to the Central Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

form prescribed by OPM.” See [5 C.F.R. § 831.614](#)(b). On remand, the parties should also be provided with an opportunity to present evidence and argument on this issue.